Supreme Court, U.S.
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NO. 92-887

IN THE SUPREME COURT OF THE UNITED STATES
1992 TERM

SANFORD J. BERGER, et al.

Petitioners

- vs -

CUYAHOGA COUNTY BAR ASSOCIATION

Respondent

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI To The Supreme Court of Ohio

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ISSUE PRESENTED

I. Whether an attorney licensed to practice law in Ohio is subject to sanction by The Supreme Court of Ohio for conduct determined to violate the Ohio Code of Professional Responsibility and the Rules for the Government of the Bar.

STATEMENT OF THE CASE

By Amended Complaint filed January 17, 1991, (A32-A46) respondent Cuyahoga County Bar Association, through a trial committee of its Certified Grievance Committee, charged petitioners Sanford Berger and Robert Fertel with misconduct which constituted violations of Ohio's Code of Professional Responsibility and The Ohio Supreme Court's Rules for the Government of the Bar. (A24-28) and (A30-A31).

Attorneys Berger and Fertel filed an Answer to the Amended Complaint on April 11, 1991, denying the allegations. Consequently, a hearing on the Amended Complaint was conducted before a panel of the Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio.

The panel of the Board of Commissioners on Grievances and Discipline

of The Supreme Court of Ohio ultimately issued Findings of Fact, Conclusions of Law and a Recommendation. (A1-A17). That panel concluded that Berger and Fertel had committed most of the misconduct alleged and recommended that the attorneys be suspended from the practice of law in Ohio for a period of one year. The full Board of Commissioners on Grievances and Discipline adopted the Findings, Conclusions and Recommendation of the panel.

By opinion and order dated September 2, 1992, 64 Ohio St. 3d 454, 597 N.E. 2d 81, (A18-A23), the Ohio Supreme Court, concurring in the Finding and Recommendations of the Board of Commissioners on Grievances and Discipline, suspended both Berger and Fertel from the practice of law in Ohio for a period of one year and assessed the costs of the action against them.

Subsequently, on October 27, 1992, Berger and Fertel sought a stay of the imposition of their suspensions. On November 12, 1992, The Ohio Supreme Court denied the Motion for Stay.[1] On November 23, 1992, the present Petition for a Writ of Certiorari was filed by petitioners Berger and Fertel.

STATEMENT OF THE FACTS

Sanford Berger and Robert Fertel are attorneys, licensed to practice law in the State of Ohio, maintaining offices in Cleveland, Ohio.

In December, 1984, Daniel Gurish consulted with petitioners Sanford Berger and Robert Fertel regarding an appeal Gurish wished to pursue from an adverse summary judgment ruling in a lawsuit

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[1]The petitioners also filed an Application for Stay with Justice Stevens of the United States Supreme Court on October 19, 1992. Respondents are unaware of any action or ruling on that Application.

brought by him pursuant to 42 U.S.C. 1983. Berger and Fertel successfully appealed that adverse decision. On remand, the case was again disposed of on summary judgment and Berger and Fertel successfully appealed. Counsel requested and were paid Five Hundred Dollars ($500.00) for the appeals, and Two Thousand Five Hundred Dollars ($2,500.00) as a retainer on the second remand trial.

On April 3, 1987, Gurish, Berger and Fertel entered into a fee agreement in which counsel's past services were acknowledged; also acknowledged was Gurish's payment of Two Thousand Five Hundred Dollars ($2,500.00), which sum "is not refundable, but [which] sum shall first be deducted from any sums realized prior to the 60% [to Gurish] - 40% [to counsel] split."

The case was set for trial in August, 1988. Approximately one week prior to

trial, Berger and Fertel advised Gurish that no fee agreement had been entered into by the parties and demanded that such an agreement be completed prior to trial. Having forgotten about the April 3, 1987 contract, Gurish signed a new contingent fee contract calling for a 50% counsel fee and not providing for credit for the monies advanced by Gurish.

The trial resulted in a jury verdict in Gurish's favor in the amount of One Hundred Thousand Dollars ($100,000.00). Subsequently, a motion for attorney fees filed pursuant to 42 U.S.C. 1988 was compromised and settled for Thirty Thousand Dollars ($30,000.00). The trial court, at the insistence of Berger and Fertel, did not make a finding as to reasonable attorney fees, but, rather, disposed of the motion as "settled and dismissed."

On March 13, 1989, two checks were issued by the defendant in payment of the

judgment in favor of Gurish and the compromise settlement of the attorney fees. A check in the amount of One Hundred Thousand Dollars ($100,000.00) was issued payable to Gurish, Berger and Fertel; a check in the amount of Thirty Thousand Dollars ($30,000.00) was issued payable to Berger and Fertel only. The check for Thirty Thousand Dollars ($30,000.00) was endorsed and negotiated by Berger and Fertel. Relative to the check which represented the jury award, Berger contacted Gurish by telephone and requested a meeting at which Gurish would endorse the award check and receive Fifty Thousand Dollars ($50,000.00). Gurish refused to endorse the check, claiming he was entitled to receive one-half of the jury award plus reimbursement of attorney fees totaling Thirty Thousand Dollars ($30,000.00), the compromise amount. Berger and Fertel claimed they were entitled to one-half the

jury award plus all of the attorney fee settlement, totaling Eighty Thousand Dollars ($80,000.00).

At some point in time, Gurish suggested that Berger and Fertel agree to distribute Fifty Thousand Dollars ($50,000.00) to him, representing the "undisputed" amount due him, and place the remaining funds in escrow. The attorneys refused and simply maintained possession of the unendorsed check.

On March 7, 1989, Gurish filed a complaint against Berger with the Certified Grievance Committee of the Cuyahoga County Bar Association ("Grievance Committee"). In addition, on June 9, 1989, Gurish filed an action for declaratory judgment against Berger and Fertel in the Court of Common Pleas for Cuyahoga County, seeking a declaration of his rights under the fee contract.

On June 12, 1989, Berger and Fertel

filed a multi-count complaint and "supplemental" complaint against Gurish and his attorney alleging, inter alia, that the filing of the complaint with the Certified Grievance Committee of the Cuyahoga County Bar Association constituted an invasion of privacy and interference with contractual right

The Grievance Committee conducted an investigatory hearing on November 20, 1989, at which Berger appeared, represented by Fertel. At the close of testimony, the Grievance Committee voted to proceed with a formal complaint against Berger before the Board of Commissioners on Grievances and Discipline. It was also determined that Fertel's conduct should be investigated at a formal hearing. Fertel failed to appear at that subsequently scheduled investigatory hearing.

Following a trial before a panel of the Board of Commissioners on Grievance and

Discipline, the allegations contained in Counts One, Three, Four and Five were found to have been proven. Ultimately, The Ohio Supreme Court adopted those findings and Berger and Fertel were suspended from the practice of law in Ohio for one year. (A22-A23).

ARGUMENT AND LAW

ISSUE I

Whether an attorney licensed to practice law in Ohio is subject to sanction by The Ohio Supreme Court of Ohio for conduct determined to violate the Ohio Code of Professional Responsibility of the Bar.

Petitioners are seeking intervention by this Court in a matter which is and should be exclusively within the province of The Ohio Supreme Court. The issues are clear and straight forward, despite petitioners' attempts to obfuscate and mischaracterize what has occurred.

Based on principles of comity and federalism, the doctrine of abstention articulated by this Court in Younger v. Harris, 401 U.S. 37 (1971) is equally applicable to the proceedings at issue in this case. While petitioners are not here seeking injunctive relief, but rather are seeking to overturn state disciplinary proceedings and actions which have already taken place, the Younger rationale

reflecting a policy against federal intervention still holds merit. This Court and the lower Federal courts have consistently held that federal intervention in state disciplinary matters is inappropriate. See, e.g., Middlesex County Ethics Comm. v. Garden State Bar Ass'n., 457 U.S. 423 (1982); Hefner v. Alexander, 779 F.2d 277 (5th Cir. 1985); Director of Lawyers Professional Responsibility Bd. v. Perl, 752 F.2d 352 (8th Cir. 1985); Rosenthal v. Carr, 614 F.2d 1219 (9th Cir.), cert. denied, 447 U.S. 927 (1980); Gipson v. New Jersey Supreme Court, 558 F.2d 701 (3rd Cir. 1977); Erdmann v. Stevens, 458 F.2d 1205 (2d Cir.), cert. denied, 409 U.S. 889 (1972).

The Middlesex Court explicitly recognized that states have an "extremely important interest in maintaining and assuring the professional conduct of the attorneys it licenses." Middlesex, 457

U.S. at 434. In Gipson, the Court noted that "incursions by Federal courts into ongoing disciplinary proceedings would be peculiarly disruptive." Gipson, 558 F.2d at 704.

By state constitutional provision, The Ohio Supreme Court is expressly vested with the authority and jurisdiction to regulate all matters relating to the practice of law in the state, including the discipline of persons admitted to such practice. Ohio Const. Art. IV, Section 2(B)(1)(g). (A29). Pursuant to this authorization and its inherent power to discipline attorneys practicing under its license, the Court has promulgated rules for the governance of the Ohio Bar, establishing the authority of Bar committees to investigate and prosecute complaints against attorneys licensed in Ohio. Supreme Court Gov.R.V(5)(a). (A30-A31). See, Cleveland Bar Ass'n. v. Pleasant, 167 Ohio St. 325,334-36 (1958).

Petitioners do not suggest that the constitutional authority of The Ohio Supreme Court to discipline Ohio-licensed attorneys is invalid or violative of federal constitutional protections. Petitioners do not suggest that the rules established by The Ohio Supreme Court for the governance of Ohio-licensed attorneys are constitutionally impaired. Nor do petitioners suggest that they were denied their due process rights by the proceedings which ocurred under those governance rules. See, Zauderer v. Office of Disciplinary Counsel, 471 U.S. 626 (1985).

What petitioners do assert is that their conduct is immune from The Ohio Supreme Court's scrutiny because the alleged misconduct occurred in Federal court proceedings. That assertion is both legally and factually incorrect. It is legally incorrect because the Federal courts have recognized the interest of the

state in regulating the conduct of attorneys it licenses. It is factually incorrect because the sanctioned conduct did not occur in Federal court proceedings.

In the first count of the complaint against them, Berger and Fertel were charged with taking an excessive fee based upon their fee agreement with Gurish. That fee agreement, entered into in Ohio and governed by Ohio law, called for petitioners to render legal services to Gurish in exchange for 50% of the recovery or award. Berger and Fertel attempted to retain Eighty Thousand Dollars ($80,000.00) of a total pool of One Hundred Thirty Thousand Dollars ($130,000.00). By their own insistence, Berger and Fertel precluded the Federal court from awarding attorney fees and from adopting the settled upon sum as its own finding of reasonable fees. The Federal court never made any finding regarding the fee or how the fee agreement

should be interpreted. Thus, on Court One, the discipline invoked did not involve scrutiny by The Ohio Supreme Court of a Federal court fee award under 42 U.S.C. Section 1988.

In Court Three, Berger and Fertel were found to have violated the Disciplinary Rule regarding prompt distribution of client funds. Once again, the allegations did not involve any Federal court action or conduct, but rather related to a fee agreement governed by Ohio law and the failure to distribute the "undisputed" amount to petitioners' client.

In Court Four, the allegation against Fertel for failure to cooperate with the Grievance Committee's investigation relates only to The Ohio Supreme Court's Gov.R.V(5)(a). The heart of The Ohio Supreme Court's inherent power to govern attorney conduct is its ability to investigate allegations of wrongdoing and

to compel cooperation in those investigations. Disciplinary Counsel v. Liebold, 53 Ohio St. 3d 128 (1990); Cleveland Bar Association v. Keane, 20 Ohio St. 3d 11 (1985).

Without question, the allegations contained in Court Five of the complaint related to state court activity and conduct by Berger and Fertel. In a state court proceeding, petitioners caused a settlement premised and conditioned upon Gurish's dismissal of his complaint before the Cuyahoga County Bar Association's Certified Grievance Committee and the further agreement of Gurish that he would not testify at the trial on that grievance. As the Board of Commissioners specifically found, that conduct was intended to stymie the disciplinary process and protect the petitioners from having to answer the charges against them.

The discipline imposed upon

petitioners is based upon their conduct as attorneys licensed to practice by The Ohio Supreme Court; the discipline does not derive from any conduct of the petitioners in Federal court proceedings. The charges resulted from conduct over which the Federal court had no supervision or control.

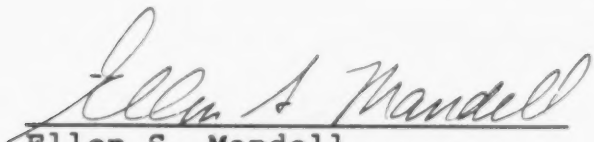
CONCLUSION

Petitioners raise no legitimate Federal constitutional questions. The issues presented by petitioners are the product of "smoke and mirrors" and bear no factual or legal relationship to the state proceedings below.

Having been afforded all due process rights in the state proceedings and, further, having no basis for asserting any constitutional infirmity in Ohio's disciplinary scheme, the petitioners are not entitled to review of their suspensions

from state legal practice by this Honorable Court.

Respectfully submitted,



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CERTIFICATE OF SERVICE

A copy of the foregoing Brief of Respondent in Opposition to Petition for a Writ of Certiorari to The Supreme Court of Ohio was forwarded this 23rd day of December, 1992 to Sanford J. Berger and Robert M. Fertel, Berger & Fertel, 1836 Euclid Avenue, Room 305, Cleveland, Ohio 44115-2234.

Ellen S. Mandell
Attorney for Respondent

APPENDIX

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THE BOARD OF COMMISSIONERS
ON
GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re:	( ) Certified to
Complaint against:	( )Ohio Supreme
Sanford J. Berger #0008346	( )Court on 5/7/92
AND	( )
Robert M. Fertel #0022109	( )CASE NO. 90-61
RESPONDENT,	( )
Cuyahoga County Bar Association,	( )
RELATOR.	( )

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND RECOMMENDATION OF THE BOARD OF COMMISSIONERS ON GRIEVANCES AND DISCIPLINE OF THE SUPREME COURT OF OHIO

A hearing on this matter was held on April 19, 1991 at the offices of the Cuyahoga County Bar Association, 1228 Euclid Avenue, 370 The Halle Building, Cleveland, Ohio at 10:00 a.m. The Respondents, Sanford J. Berger and Robert M. Fertel, were present at the hearing and represented each other. Relator was represented by Lawrence A. Turbow, Esq., 24500 Chagrin Boulevard, #101, Beachwood,

Ohio; Ellen S. Mandell, 24500 Chagrin Boulevard, #101, Beachwood, Ohio; and Marshall Wolfe, Esq., 1717 East Ninth Street, Cleveland, Ohio 44114.

The Hearing Panel consisted of Charles E. Brown, Esq., Ohmer Crowell, and Thomas G. Knoll, the Panel Chairman. For purposes of the hearing, Mr. Brown presided. Pursuant to Gov. Rule V, Section 13, no member of the Panel was a resident of the District from which the Complaint originated, nor was any member of the Panel a member of the Probable Cause Panel that reviewed the matter pursuant to Section 10(b) of Gov. Rule V. The Complaint and Certificate in this matter were filed by Relator with the Board of Commissioners on Grievances and Discipline on October 4, 1990. Subsequent thereto, on January 17, 1991, the Relator filed its Amended Complaint and Certificate with the Board of Commissioners. In response to the Amended Complaint, the Respondents, on April 11,

1991, filed their Answer to the Amended Complaint.

FINDINGS OF FACT
BACKGROUND INFORMATION

1. Respondents, Sanford J. Berger and Robert M. Fertel, are attorneys, licensed to practice in the State of Ohio and in the United States District Court for the Northern District of Ohio, Eastern Division, and the United States Court of Appeals for the Sixth Circuit.

2. Relator, in its Amended Complaint, has set forth five (5) separate counts, all of which arise out of Respondents' representation of Daniel Guris ("Guris") [sic] in connection with his claim of wrongful discharge arising under 42 U.S.C. §1983.

3. Count one alleges the Respondents charged excessive attorney fees in violation of DR 2-106(A). Count two charges that the Respondents engaged in dishonesty, fraud and deceit in misrepresenting to their client the attor-

ney fee contracts that were in existence and that their conduct violated DR 1-102(A)(4). Count three charges that the Respondents withheld settlement funds from their client from March, 1989 to May 1990 in violation of DR 9-102(B). Count four charges that Respondent Fertel failed to cooperate with the Relator's investigation. Respondents are alleged in Count five to have prevented the grievant from cooperating withe the pending bar investigation through litigation in Cuyahoga County Common Pleas Court and arranging for the terms of a settlement silencing all parties in violation of DR 1-102(A)(2), (5), (6) and DR 1-103.

COUNT ONE

4. Respondents were originally consulted by Guris in December of 1984 in connection with an action captioned Daniel Guris v. Gerald McFaul, et al., Case No. 83-3 in the United States District Court for the Northern District of Ohio, Eastern Division. That lawsuit brought pursuant to 42 U.S.C. Sec. 1983, alleged that Guris had been wrongfully ter-

minated from his position as a Cuyahoga County Deputy Sheriff.

5. Prior to consulting with the Respondents, Guris had been represented in the action against McFaul by other counsel. Until contacting Respondents, Guris' action had been unsuccessful and a Summary Judgment had been granted in favor of the defendants. Berger and Fertel were retained by Guris to pursue an appeal of the trial court's decision and were ultimately successful in persuading the United States Court of Appeals for the Sixth Circuit to reverse the trial court's decision and remand the case for trial. During the pendency of the appeal, Guris advanced Respondents Five Hundred Dollars ($500.00) for fees and/or other expenses. Upon remand, the case was once again decided on summary judgment in favor of the defendants, but was again reversed in September of 1986.

6. On April 3, 1987, Guris, Berger and Fertel entered into a fee agreement entitled "Contingency Contract" in which Guris acknowledged the past services rendered by Berger and Fertel and wherein all parties acknowledged that Guris had paid Respondents the additional sum of Two Thousand Five Hundred Dollars ($2,500.00) for representation relative to the remand for trial. This amount was

not to be refundable, but was to be deducted from any award ultimately realized in the matter prior to the division of such award on the basis of 60% for Guris and 40% for Respondents.

7. Approximately one week prior to the final trial in this matter, in August of 1988, Berger and Fertel contacted Guris and as a result of that conversation, entered into a second fee contract callling for a division of any award in the matter on the basis of 50% to Respondents and 50% to Guris. Although none of the parties was able to produce a written document pertaining to the August 1988 fee contract, there seemed to be no dispute as to existence of an oral agreement in that regard. At the hearing Guris testified that at the time he entered into the second fee contract contract calling for a 50%-50% fee division, he had forgotten the existence of the prior agreement relating to a 60%-40% division; however, the Board was unconvinced that Guris was mislead in this regard.

8. Upon trial of the Guris claim against Sheriff McFaul, the Respondents were successful in securing a jury award of One Hundred Thousand Dollars ($100,000.00) in Guris' favor.

9. Following the trial, Respondents filed a

claim for Guris as the prevailing party, pursuant to 42 U.S.C. Sec. 1988, requesting attorney fees of One Hundred Ninety-One Thousand Dollars ($191,000.00) for their representation of Guris in connection with the wrongful discharge matter.

10. During the pendency of the Sec. 1988 proceedings, the issue of attorney fees was negotiated between the Respondents and the Cuyahoga County Prosecutor's Office representing the defendant Sheriff and, at the urging of Guris, was settled for the sum of Thirty Thousand Dollars ($30,000.00). Subsequent thereto, on March 13, 1989, the Cuyahoga County Commission adopted a resolution authorizing payment to Guris, Berger and Fertel in the amount of One Hundred Thousand Dollars ($100,000.00) and an additional payment of Thirty Thousand Dollars ($30,000.00) in settlement of attorney fees payable to Respondents only.

11. In due time, after adoption of the resolution by the Cuyahoga County Commission, two (2) checks were forwarded to Respondents by the Cuyahoga County Prosecutor's Office. The check for $30,000.00, made payable to Berger and Fertel, was endorsed and negotiated by them upon receipt. With respect to the check for $100,000.00, one of the Respondents con-

tacted Guris requesting he endorse the check and receive a distribution of $50,000.00, a proposal to which Guris strongly objected upon his belief that such an arrangement violated the subsequent 50/50 fee contract and would result in Respondents receiving a fee of $80,000.00 against a portion of the jury award to Guris in the amount of $50,000.00. Respondents insisted on such a fee of $80,000 and attempted to collect this fee from Guris.

COUNT TWO

12. Count Two arises out of Relator's contention that the entering into two (2) separate fee agreements with Guris and the failure to remind him that the first fee agreement was entered into, was conduct involving dishonesty, fraud, deceit and misrepresentation on the part of the Respondents. The Relator did not show by clear and convincing evidence that the Respondents engaged in fraud or deceit in getting their client to agree to a subsequent oral contract to share any recovery on a 50/50 basis. The Respondent lawyers and their client understood that the final agreement called for a 50/50 split. (Tr.p171)

COUNT THREE

13. As a result of his being unable to reach an accord with Respondents on the issue of his financial participation in the $130,000

received from the Cuahoga County Prosecutor's Office, Guris obtained new legal counsel and on June 9, 1989, filed an action for Declaratory Judgment against Berger and Fertel in the Court of Common Pleas for Cuyahoga County.

14. In response to Guris' Declaratory Judgment action, the Respondents, on June 12, 1989, filed an action against Guris and his then attorney, which action contained fourteen (14) separate counts and requested damages totalling in excess of $2.5 million dollars. All of this litigation was ultimately resolved by a settlement agreement entered inot between Guris and Respondents, the terms of which settlement remain undisclosed by virtue of the provisions Respondents caused to be drafted into the settlement Journal Entry. During the entire period from March 13,1989 through approximately May 30, 1990 (the date of settlement of the Guris v. Berger and Fertel litigation), the full amount of the award proceeds remained in Res-

pondents' possession and Guris, despite his requests, was denied access to even the undisputed portion of the funds ($50,000.00).

COUNT FOUR

15. On March 7, 1989, Guris filed a Complaint against Respondent Berger with the Certified Grievance Committee of the Cuyahoga County Bar Association.

16. On November 20, 1989, an investigatory hearing was conducted by the Certified Grievance Committee. Respondent Berger attended and was represented by Fertel.

17. As a result of that hearing, the Certified Grievance Committee filed a formal Complaint with the Board of Commissioners on Grievances and Discipline against Respondent Berger and further determined that the evidence presented implicated Respondent Fertel.

18. Subsequent thereto, an investigatory hearing was scheduled for February 8, 1990 by the Certified Grievance Committee and notice thereof was forwarded to Fertel. Despite this

notice, Respondent Fertel failed to appear at that hearing.

19. On January 23, 1990, Respondents filed a Complaint in the United States District Court for the Northern District of Ohio, Eastern Division, against the Cuyahoga County Bar Association, its President, the Certified Grievance Committee of the Cuyahoga County Bar Association; the Board of Commissioners on Grievances and Discipline, the Ohio Supreme Court and others, seeking a Temporary Restraining Order preventing further investigation by the Certified Disciplinary Committee of the Cuyahoga County Bar Association and the Board of Commissioners on Grievances and Discipline of the disciplinary charges. On January 26, 1990, the request for Temporare Restraining Order was denied. On September 19, 1991, the U.S. District Court granted the motions of the defendants (state disciplinary agencies) and the complaint was dismissed.

COUNT FIVE

20. As a part of the resolution of the litigation filed against the parties by each other, Respondents and Guris entered into, on or about May 30, 1990, a Journal Entry wherein it was agreed substantially as follows:

(a) That all litigation existing between the parties would be dismissed, with prejudice;

(b) That the Complaint filed by Guris with the Cuyahoga County Bar Association against the Respondents would be dismissed by means of correspondence prepared by Guris and approved by Respondents;

(c) That all matters pertaining to the terms of settlement would be held in strictest confidence by all parties; and

(d) That any inquiries made of the parties by any Bar Association or members of the news media would be responded to by indicating only that the matter between the parties had been resolved.

21. The evidence before the Board was clear and convincing that the language referred to in subparagraphs (b) and (d) of paragraph 20 above was included in the Journal Entry at the insistence of the Respondents.

22. In furtherance of the terms of the foregoing Journal Entry, on June 8, 1990, Guris did forward to the Certified Grievance Committee for the Cuyahoga County Bar Association correspondence requesting that the proceedings against Respondents be dismissed.

CONCLUSIONS OF LAW

23. The Board finds by clear and convincing evidence that Respondents conduct in charging and attempting to recover a fee comprised of 50% of the jury award to Guris ($50,000.00) plus the entire $30,000.00 received as a result of the settlement of the attorney fees motion in violation of DR2-106(A) [charging an excessive fee]. After reviewing the authority by both the Relator and the Respondents, the Panel concludes that the existing author-

ity with respect to 42 U.S.C. Sec. 1988 does not support Respondents' contention that the entire fee award of $30,000 was for the benefit of Respondents only, and in addition to the contracted-for fee. The effect of the settlement of Guris' federal claims resulted in a fund of $130,000 held for the benefit of the client. Venegas v. Mitchell, 110 S.Ct. 1679 (1990).

24. The Panel finds there was insufficient evidence to sustain a violation of DR1-102(A)(4) in Count Two and dismisses the same.

25. Further, the Board finds on Count Three that Respondents' conduct in failing to provide Guris with any portion of the award, even that which was undisputed, for a period in excess of one year, was in violation of DR 9-102(B)(4) [failing to pay to a client funds which the client is entitled to receive].

26. Further, the Board finds on Count Four that Respondent Fertel's failure to appear before the Certified Grievance Committee of

the Cuyahoga County Bar Association was in violation of Sec. 5(a) of Gov. Bar Rule V. The Respondents conduct in dictating terms of the Cuyahoga County Common Pleas Court Journal Entry on May 30, 1990, requiring Guris to withdraw his Complaint and further, limiting his testimony in any disciplinary proceeding was in violation of their responsibility to assist in the investigation of a Complaint and DR1-102(A)(2), (5) and (6) as charged in Count Five.

From the very onset of this matter, Respondents refused to accept any ethical responsibility for their conduct in attempting to collect their legal fees from Guris. A clearly excessive fee was charged, a client was denied access to any portion of the settlement proceeds, and when called upon to account for their conduct in an ethical investigation, the Respondents attempted to end the bar association's inquiry and silence the complainant forever. The Respondents' conduct

throughout this proceeding strikes at the heart of the disciplinary system and the rules established by the Ohio Supreme Court to ensure ethical conduct within the profession.

It is the conclusion of the Panel that by reason of Respondents' conduct as described herein, Respondents should be suspended from the practice of law within the State of Ohio for a period of one (1) year.

RECOMMENDATION

Pursuant to Gov. Bar R. V(18), the Board of Commissioners on Grievances and Discipline of the Supreme Court of Ohio considerdd this matter on April 10, 1992. The Board adopted the Findings of Fact and Conclusions of Law of the Panel and recommends that the Respondents, Sanford J. Berger and Robert M. Fertel, be suspended for one (1) year from the practice of law in the State of Ohio. The Board further recommends that the costs of these proceedings be taxed to the Respondent in any

disciplinary order entered, so that execution may issue.

Pursuant to the order of the Board of Commissioners on Greivances and Dsicipline of The Supreme Court of Ohio, I hereby certify the foregoing Findings of Fact, Conclusions of Law, and Recommendations as those of the Board.

/s/ Jonathan W. Marshall
JONATHAN W. Marshall, Secretary
Board of Commissioners on Grievances and Discipline of The Supreme Court of Ohio

CUYAHOGA COUNTY BAR ASSOCIATION v. BERGER

CUYAHOGA COUNTY BAR ASSOCIATION v. FERTEL

[Cite as Cuyahoga Cty. Bar Assn. v. Berger (1992), 64 Ohio St.3d 454]

Attorneys at law--Misconduct--One year suspension--Charging a clearly excessive fee--Refusing to promptly pay funds to a client which client is entitled to receive--Neglecting or refusing to assist the grievance committee's investigation--Circumventing a disciplinary Rule through actions of another--Engaging in conduct prejudicial to the administration of justice--Engaging in conduct adversely reflecting on one's fitness to practice law.

(Nos. 92-905 and 92-906--Submitted June 17, 1992--Decided September 2, 1992.)

ON CERTIFIED REPORT by the Board of Commissioners on Grievances and Discipline of the Supreme Court. No. 90-61.

By amended complaint filed January 17, 1991, relator Cuyahoga County Bar Association charged respondents, Sanford J. Berger (Attorney Registration No. 0008346) and Robert M. Fertel (Attorney Registration No. 0022109) with misconduct, in five counts: violations of DR2-106(A) (charging a clearly excessive fee); 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation); 9-102(B)(4) (refusing to

promptly pay funds to a client which client is entitled to receive); Gov.Bar R. V(5)(a) (neglecting or refusing to assist the grievance committee's investigation); DR1-102(A)(2), (5), (6) and 1-103(A) (circumventing a Disciplinary Rule through actions of another; engaging in conduct prejudicial to the administration of justice; engaging in conduct adversely reflecting on one's fitness to practice law; and failing to report unprivileged knowledge of a violation of DR 1-102 to a tribunal or other investigative authority).

Respondents' answer to the amended complaint, filed April 11, 1991, denied the allegations of misconduct and raised affirmative defenses. Respondents alleged that the board lacked subject-matter jurisdiction and that the charges were not proper because of federal preemption and the Supremacy Clause of Clause 2, Article VI of the United States Constitution.

Testimony and other evidence was presented

at a hearing before a panel of the Board of Commissioners on Grievances and Discipline of the Supreme Court. The record reflects that the charges of misconduct arose from respondents' representation of Daniel Gurish in connection with his claim for wrongful discharge as a Cuyahoga County deputy sheriff arising under Section 1988, Title 42, U.S. Code. Respondents obtained a judgment in favor of Gurish and against Cuyahoga County Sheriff McFaul in the amount of $100,000. Thereafter, pursuant to Section 1988, Title 42, U.S.Code, the court awarded $30,000 as reasonable attorney fees. At Gurish's urging, respondents accepted a total settlement "package" of $130,000.

The Board of Commissioners of Cuyahoga County authorized preparation of a voucher payable to Gurish, Berger and Fertel for $100,000 and an additional voucher payable to only Berger and Fertel for $30,000. These checks were delivered to respondents and the

$30,000 check was cashed by respondents. A disagreement resulted over the division of the $100,000 check. Respondents contended they were entitled to the $30,000 in attorney fees and, in addition, fifty percent of the $100,000 award, based upon a contingency fee agreement between the parties. Gurish wanted fifty percent of the $130,000 "package." As a result of the dispute, Gurish filed an action in the Court of Common Pleas of Cuyahoga County for declaratory judgment as to the proper division of the $100,000 check. Respondents filed a separate action seeking damages against Gurish and his new attorney in the amount of $2,500,000.

The two actions were settled on May 30, 1990, on the basis of a split of the $130,000 package, with Gurish receiving $65,000 and respondents receiving $35,000 (in addition to the $30,000 attorney-fee check). The agreement required strict confidentiality as to the terms of the settlement and, in the event

of inquiries by any bar association, an agreement that the response would be limited to: "the matters have been resolved."

The hearing panel reviewed the complaint against respondents and made findings of fact, conclusions of law and a recommendation. Asserting that the respondents' conduct struck at the heart of the disciplinary system and ethical rules established by the Ohio Supreme Court, the panel noted that respondents refused to accept any ethical responsibility for their conduct.

Moreover, the panel concluded that respondents charged an excessive fee, denied a client access to settlement proceeds, and attempted to suppress the bar association's investigation, thus violating DR2-106(A), 9-102(B)(4), Gov. Bar R. V(5)(a) and DR 1-102 (A)(2), (5), and (6). However, the panel found no violation of DR 1-102(A)(4).

The panel recommended that respondents be suspended from the practice of law for one

year. The board adopted the findings, conclusions and recommendations of the panel and further recommended that costs be taxed to respondents.

Laurence A. Turbow, Ellen S. Mandell and Marshall J. Wolf, for relator.

Sanford J. Berger, for respondent Robert M. Fertel.

Robert M. Fertel, for respondent Sanford J. Berger.

Per curiam. Based upon review of the record, including the exhibits, we concur in the findings and recommendations of the board. Respondents, Sanford J. Berger and Robert M. Fertel, are each hereby suspended from the practice of law in Ohio for one year. Costs taxed to respondents.

Judgment accordingly.

MOYER, C.J., SWEENEY, HOLMES, DOUGLAS, WRIGHT, H. BROWN and RESNICK, JJ., concur.

DR 1-102 of OHIO SUPREME COURT'S CODE OF PROFESSIONAL RESPONSIBILITY

DR 1-102 MISCONDUCT.

(A) A lawyer shall not:

(1) Violate a Disciplinary Rule.

(2) Circumvent a Disciplinary Rule through actions of another.

(3) Engage in illegal conduct involving moral turpitude.

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 1-103 of OHIO SUPREME COURT'S CODE OF PROFESSIONAL RESPONSIBILITY

DR 1-103 DISCLOSURE OF INFORMATION TO AUTHORITIES.

(A) A lawyer possessing unprivileged knowledge of a violation of DR 1-102 shall report such knowledge to a tribunal or other authority empowered to investigate or act upon such violation.

(B) A lawyer possessing unprivileged knowledge or evidence concerning another lawyer or a judge shall reveal fully such knowledge or evidence upon proper request of a tribunal or other authority empowered to investigate or act upon the conduct of lawyers or judges.

(C) Any knowledge obtained by a member of a committee or subcommittee of a bar association designed to assist lawyers with substance-abuse problems shall be privileged for all purposes under DR 1-103, provided such knowledge was obtained while

such member was performing duties as a member of such committee or subcommittee.

DR2-106 of OHIO SUPREME COURT'S CODE OF PROFESSIONAL RESPONSIBILITY

DR2-106. FEES FOR LEGAL SERVICES

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

(B) A fee is clearly excessive when, after a review of the facts, a lawyer of ordinary prudence would be left with a definite and firm conviction that the fee is in excess of a reasonable fee.

Factors to be considered as guides in determining the reasonableness of a fee include the following:

(1) The time and labor required, the novelty and difficulty of the questions involved, and the skill requisite to perform the legal services properly.

(2) The likelihood, if apparent to the client, that the acceptance of the particular employment will preclude other employment by the lawyer.

(3) The fee customarily charged in the locality for similar legal services.

(4) The amount involved and the results obtained.

(5) The time limitations imposed by the client or the circumstances.

(6) The nature and length of the professional relationship with the client.

(7) The experience, reputation, and ability of the lawyer or pawyers performing the services.

(8) Whether the fee is fixed or contingent.

DR9-102(B)(4) of OHIO SUPREME COURT'S CODE OF PROFESSIONAL RESPONSIBILITY

DR9-102(B) A lawyer shall:

(4) Promptly pay or deliver to the client as requested by a client the funds, securities, or other properties in the possession of the lawyer which the client is entitled to receive.

OHIO CONSTITUTION

ARTICLE IV SECTION 2(B)(1)(g)

(B)(1) The supreme court shall have original jurisdiction in the following:

* * * *

(g) Admission to the practice of law, the discipline of persons so admitted, and all other matters related to the practice of law.

SUPREME COURT OF OHIO'S RULES FOR THE GOVERNMENT OF THE BAR OF OHIO (1991/1992) RULE V(5)(a)

RULE V(5)(a) Application of Rule; Authority and Duty of Bar Committees and Dsiciplinary Counsel.

From and after the effective date of this rule, all proceedings with regard to mental illness and complaints amd grievances involving alleged misconduct by Justices, judges and by attorneys and counselors at law; all proceedings for the discipline of such Justices, judges and attorneys and counselors at law, persons under suspension, probation or disbarred from the practice of law; and all proceedings for the reinstatement as an attorney and counselor at law shall be brought, conducted and disposed of in accordance with the provisions of this rule. Disciplinary Counsel and any Certified Grievance Committee shall investigate any

matter filed with it and may cause a complaint to be filed pursuant to this rule in cases where it finds probable cause to believe that misconduct has occurred or that a condition of mental illness exists.

* * *

The Board of Commissioners, Disciplinary Counsel and the President, Secretary or Chairman of a Certified Grievance Committee of any regularly organized bar association in the state may call upon any Justice, judge or attorney and counselor at law to assist in any investigation or to testify in any hearing before the Board of Commissioners or any panel for which provision is made in this rule, as to any matter as to which he would not be bound to claim privilege as an attorney at law. No such Justice, Judge or attorney and counselor at law shall neglect or refuse to so assist in any such investigation or so to testify.

BEFORE THE BOARD OF COMMISSIONERS
ON GRIEVANCES AND DISCIPLINE
OF
THE SUPREME COURT OF OHIO

In re:		
Complaint against		
Sanford J. Berger and Robert M. Fertel 1836 Euclid Avenue Cleveland, Ohio 44115 RESPONDENT	)	No. 90-61 AMENDED COMPLAINT AND CERTIFICATE (Rule V of the Supreme Court Rules for the Government of the Bar of Ohio)
Certified Grievance Committee of the Cuyahoga County Bar Association 1228 Euclid Avenue Suite 370 Cleveland, Ohio 44115 RELATOR	)	

Now comes the Relator and alleges that Sanford J. Berger and Robert M. Fertel, Attorneys at Law, duly admitted to the practice of law in this State of Ohio are guilty of the following misconduct:

COUNT I

1. At all relevant times Respondents in this matter, Sanford J. Berger and Robert M. Fertel, were attorneys-at-law licensed to practice in the State of Ohio and believed to be licensed to practice in the United States District Court for the Northern District of Ohio, Eastern Division and the United States Court of Appeals for the Sixth Circuit.

2. At all relevant times Relator is the Cuyahoga County Bar Association Certified Grievance Committee, authorized by the Ohio Supreme Court to investigate and prosecute alleged violations of the Code of Professional Responsibility.

3. In 1983, Daniel Gurish retained the services of Respondents to represent him in the United States Court of Appeals for the Sixth Circuit as a result of the dismissal of an action titled Daniel Gurish vs. Gerald T. McFaul, Sheriff, bearing the

U.S. District Court Case No. C83-3. For said services, Gurish agreed to pay Respondents a sum certain, to-wit: Two Thousand Five Hundred Dollars ($2,500.00).

4. Respondents were successful in that the United States Court of Appeals for the Sixth Circuit remanded the case to the District Court for further proceedings. The District Court granted summary judgment in favor of McFaul and Respondents again were successful in obtaining a remand from the United States Court of Appeals for the Sixth Circuit. Ultimately, the case of Gurish vs. McFaul was tried to a jury beginning on July 28th through August 2, 1988, and a verdict was returned in favor of Daniel Gurish in the amount of One Hundred Thousand Dollars ($100,000.00). Subsequent to that an award of reasonable attorney fees, pursuant to 42 USC 1988, was requested and that matter was settled for Thirty Thousand Dollars ($30,000.00).

5. As and for fees in this matter, Respondents entered into a "Contingent Fee Agreement" with Gurish on or about April 3, 1987, which called for the Respondents to receive 40% of the proceeds from the trial as attorney fees. Further, Gurish was to receive credit for certain sums he had previously advanced to the Respondents in the earlier proceedings.

6. Approximately one week before trial, Respondents advised Gurish that there was no fee agreement in existence and requested that he sign a "Contingent Fee Agreement" in which Respondents were to receive 50% of any recovery in the Gurish vs. McFaul trial. Gurish, relying upon the representations of Respondents that no prior written fee agreement had been entered, entered into the 50% Contingent Fee Agreement.

7. As a result of the jury's decision in the Gurish vs. McFaul lawsuit,

and as a result of the settlement for the claim for attorney fees, the Cuyahoga County Auditor issued two checks, the first in the amount of One Hundred Thousand ($100,000.00) payable to Respondents and Gurish, and the second in the amount of Thirty Thousand ($30,000.00) payable only to the Respondents as and for attorney fees. Upon receipt of these checks Respondents advised Gurish that their attorney fees pursuant to the agreements were 50% of the One Hundred Thousand Dollars ($100,000.00) plus the entire Thirty Thousand ($30,000.00) received as a result of the settlement of the Attorney Fee Motion, for a total attorney fee of Eighty Thousand Dollars ($80,000.00)

8. Respondents' fees were excessive based upon the contract between Gurish and Respondents, 42 USC 1988, and in violation of DR2-106(A).

COUNT II

9. Relator realleges and reasserts all of the allegations contained in Paragraph 1 through 8 as if fully rewritten herein.

10. Respondents' actions in entering into two separate fee agreements and advising Gurish that the first agreement did not exist amounts to engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation in inviolation (sic) of DR1-102(A)(4).

COUNT III

11. Relator realleges and reasserts the allegations contained in Paragraphs 1 through 10 as if fully rewritten herein.

12. In response to the Court's jury verdict and the settlement of the Attorney Fees Motion, the Cuyahoga County Auditor issued two checks in March, 1989, in the amount of One Hundred Thousand Dollars ($100,000.00) and Thirty Thousand Dollars

($30,000.00) respectively. These checks, as of the date of the investigatory hearing, were being held by Respondents who refused to negotiate same unless Gurish will acquiesce to their demand for Eighty Thousand Dollars ($80,000.00). Said refusal to negotiate the checks and promptly to pay funds to their client violates DR9-102(B).

COUNT IV

13. Relator reasserts and realleges all the allegations contained in Paragraphs 1 through 12 as if fully rewritten herein.

14. Respondent Fertel, though duly notified, failed to appear at an investigatory hearing scheduled on this complaint on or about February 8, 1990, before the Grievance Committee of Cuyahoga County Bar Association, despite notice to him that his appearance was mandatory.

15. Respondent neither appeared at the hearing nor did he contact the

Grievance Committtee (sic) to inform him that he would not appear.

16. Respondent Fertel's conduct in failing to appear at the investigator hearing violates Government of the Bar Rule 5(a): by neglecting or refusing to assist the Certified Grievance Committee's investigation.

COUNT V

17. Relator reasserts and realleges all the allegations contained in Paragraphs 1 through 16 as if fully rewritten herein.

18. The Respondents Sanford J. Berger and Robert Fertel caused to be filed a case entitled Berger and Fertel v. Daniel Gurish, Cuyahoga County Court of Common Pleas Case No. 171154; previously Daniel Gurish had filed a Complaint against the Respondents Sanford Berger and Robert Fertel in the Court of Common Pleas, Case No. 171081. The lawsuits between the parties related to the issue of fees in the

federal court representation provided by Berger and Fertel on behalf of Gurish.

19. On or about May 30, 1990, the parties entered into a Journal Entry, a copy of which is attached hereto and incorporated herein as Exhibit "A".

20. Pursuant to the terms of the negotiations resulting in that Journal Entry, Mr. Gurish was required to dismiss his Complaint before the Cuyahoga County Bar Association against Respondents Berger and Fertel. In addition, Mr. Gurish and the Respondents were required to decline to respond substantively to any inquires (sic) made by any bar association investigating any complaint or grievance matter currently pending or to be filed.

21. The terms of the Journal Entry which were negotiated, in part by the Respondents, were in violation of DR1-102(A)(2), (5), (6) and DR1-103(A). In addition, the terms of the agreement,

pursuant to which neither Mr. Berger, Mr. Fertel, nor Mr. Gurish were permitted to cooperate with the investigators of the Certified Grievance Committee of the Cuyahoga County Bar Association, were in violation of GOV.R.5, which requires attorneys licensed in the State of Ohio to cooperate with investigations conduct by Certified Grievance Committees or Disciplinary Counsel.

Respectfully submitted,

/s/ Laurence A. Turbow
LAURENCE A. TURBOW - #6666
Attorney for Relator
24500 Chagrin Boulevard - #101
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(216) 831-8838

/s/ Ellen S. Mandell
Ellen S. Mandell - #12026
Attorney for Relator
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/s/ Marshall Wolf / ESM
Marshall Wolf - #0010381
Attorney for Relator
1717 East Ninth Street
Cleveland, Ohio 44114
(216) 623-9999

STATE OF OHIO)		IN THE COURT
	(SS:	OF COMMON
COUNTY OF CUYAHOGA)		PLEAS
		CASE NO. 171081 (Consolidated with Case No. 171154)
DANIEL GURISH,)		
Plaintiff)		
)		JOURNAL ENTRY
vs.)		
SANFORD J. BERGER, et al.)		
Defendants.)		

This cause came on for hearing this 29th day of May, 1990, upon the Complaint of the Plaintiff, Daniel Gurish versus Sanford J. Berger, Esq. and Robert Fertel, Esq. He is requesting Declaratory Judgment with respect to a contract involving the rendering of legal services. Consolidated with this case and pending is Case

No.171154, in which the parties are reversed with an additional defendant, Thomas L. Meros, Attorney for the Plaintiff in the instant case.

In the midst of trial and after full discussion with all parties, the Court finds that an agreement has been reached whereby all matters will be settled, the terms of which are as follows:

The parties have agreed to settle their differences and as a result thereof Case No. 171154 and Case No. 171081 are to be dismissed with prejudice as to all claims with plaintiffs in both cases paying the costs.

The parties have further agreed that a prior Complaint filed by Daniel Gurish with the Cuyahoga County Bar Association against Messrs. Berger and Fertel will be dismissed by him in the form of a letter to be prepared and signed by him subject to

approval of the defendants.

The parties have further agreed that the case filed in Federal District Court by Messrs. Berger and Fertel against the Cuyahoga County Bar Association, Messrs. Gurish and Meros, will be dismissed with prejudice by the plaintiffs as against defendants Gurish and Meros with prejudice at plaintiff's costs; the Federal law suit being dismissed on or before June 8, 1990.

The parties have further agreed that all of these matters will be held in strictest confidence, that no details are to be disclosed by any party thereto relative to the terms of the settlement, any amounts paid, or other actions may be taken by any party.

The parties further agree that any inquiries made by them by any bar association or member of the news media will result in a response limited to the

fact that the matters have been resolved.

It is, therefore, ORDERED, ADJUDGED and DECREED, that Case Nos. 171081 and 171154 be marked settled and dismissed at plaintiffs' costs.

It is further ORDERED, ADJUDGED and DECREED that any violation of the confidentiality clause of the agreement reached by the parties will be subject to action by the Court for contempt.

/s/ Robert M. Lawther
ROBERT M. LAWTHER, JUDGE

Dated: May 30, 1990.

/s/ Daniel Gurish
DANIEL GURISH

/s/ Sanford J. Berger
SANFORD J. BERGER, ESQ.

/s/ Thomas L. Meros
THOMAS L. MEROS,ESQ

/s/ Robert M. Fertel
ROBERT FERTEL, ESQ.

Exhibit "A" VOL 1263 PG 520

CERTIFICATE

The undersigned Howard Besser of the Certified Grievance Committee of the Cuyahoga County Bar Association hereby certifies that Laurence Turbow, Ellen Mandell and Marshall Wolf are duly authorized to represent Relator in the premises and have accepted the responsibility of prosecuting the complaint to its conclusion. After investigation, Relator believes reasonable cause exists to warrant a hearing on such complaint.

Dated _____, 19____

_____

Chairman, Certified
Grievance Committee